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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Federal Trade Commission,
Plaintiff,
v.
James D. Noland, Jr., *et al.*,
Defendants.

No. CV-20-0047-PHX-DWL

**PLAINTIFF'S NOTICE OF
READINESS FOR FINAL PRETRIAL
CONFERENCE**

**I. PARTIES' READINESS FOR SCHEDULING FINAL PRETRIAL
CONFERENCE**

Pursuant to the Court's May 28, 2020 Case Management Order (Doc. 142), the FTC hereby provides notice that there are no dispositive motions pending, and the FTC is ready for scheduling a Final Pretrial Conference. Nevertheless, for the reasons explained in Part II below, the FTC respectfully submits that judicial efficiency would be best served by the Court's delaying scheduling the Final Pretrial Conference.

Counsel for the Individual Defendants informed the FTC they are *not* ready to proceed with scheduling the Final Pretrial Conference and intend to make a separate filing soon on that point in light of counsel's recent surgery (*see* Doc. 439-1).

Counsel for the receiver is ready for scheduling a Final Pretrial Conference. The Receiver agrees with the FTC, however, that for reasons of judicial efficiency it may be

1 better to delay scheduling the Final Pretrial Conference as set forth in Section II.B.
2 below.

3 **II. FTC’S STATEMENT OF MATTERS BEST RESOLVED PRIOR TO** 4 **SCHEDULING FINAL PRETRIAL CONFERENCE.**

5 Although the FTC is ready to proceed, the FTC respectfully requests that the
6 Court delay scheduling the Final Pretrial Conference until (1) the Court has ruled on the
7 FTC’s Motion for Contempt Sanctions (Contempt Doc.¹ 106); and (2) the parties or the
8 Court have resolved the issue of the Corporate Defendants’ representation and/or the
9 question whether the Court’s liability ruling against the Individual Defendants applies to
10 the Corporate Defendants. The FTC also respectfully requests guidance from the Court
11 regarding the scope of a trial in this matter.

12 **A. FTC’s Pending Motion for Compensatory Contempt Sanctions**

13 On July 6, 2020, the Court granted in part the FTC’s motions for order to show
14 cause why the Contempt Defendants² should not be held in contempt of the Court’s 2002
15 Permanent Injunction against Jay Noland. (Contempt Doc. 101.) The Court explained
16 that it would not address the FTC’s request for civil contempt sanctions until “after it
17 resolves the FTC’s request for a permanent injunction” in this matter (the “Noland
18 Matter”). (*Id.* at 404.) On April 19, 2021, however, the Court granted the FTC’s motion
19 for leave to file a motion for civil compensatory contempt sanctions prior to the
20 resolution of the Noland Matter, accepting the FTC’s argument that a finding of contempt
21 in the Contempt Matter might be relevant to the scope of injunctive relief in the Noland
22 Matter. (Contempt Doc. 103.) On June 23, 2021, the FTC filed its motion (the
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26 ¹ The Contempt Matter is *FTC v. Netforce Seminars, et al.*, No. CV-00-2260-PHX-
27 DWL (D. Ariz.).

28 ² The Contempt Defendants are Jay Noland, Scott Harris, Thomas Sacca, Success
By Media LLC, and Success By Media Holdings Inc.

1 “Contempt Motion”) seeking a finding that the Contempt Defendants violated the 2002
2 Noland Permanent Injunction (Contempt Doc. 66) and a judgment of approximately \$7
3 million in civil compensatory contempt sanctions. (Contempt Doc. 106.) That Motion is
4 fully briefed. (Contempt Docs. 106, 112, 114.)

5 If the Court grants the Contempt Motion, it would almost certainly obviate the
6 need for a trial in this matter, at least as to all Defendants other than non-Contempt
7 Defendants Lina Noland and Enhanced Capital Funding, regarding the proper monetary
8 remedy, under Section 19 of the FTC Act (15 U.S.C. § 57b), for Defendants’ rule
9 violations because the FTC’s requested rule sanctions arise from the same transactions
10 for which the FTC seeks contempt sanctions in the form of full refunds. If the Court does
11 not grant the Contempt Motion, the next step in the Contempt Matter likely would be an
12 evidentiary hearing on the FTC’s contempt allegations and/or the amount of contempt
13 sanctions. In that scenario, given the overlapping factual and legal issues, as well as
14 parties, between the Contempt Matter and Noland Matter, the Court’s and the parties’
15 resources would best be served by conducting a single, consolidated trial.
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17 **B. Status of Case Against Corporate Defendants**

18 The FTC’s Motion for Summary Judgment as to Liability asked the Court to enter
19 judgment as a matter of law “against all Defendants on all counts.” (Noland Doc. 285 at
20 35.) The FTC also asked the Court to find Success By Media Holdings Inc., Success By
21 Media LLC, and Enhanced Capital Funding (collectively, the “Corporate Defendants”)
22 “jointly and severally liable” and to find the individual defendants jointly and severally
23 liable for the Corporate Defendants’ wrongdoing. (Noland Doc. 285 at 34-35.) The
24 Court, however, declined to grant the FTC’s request regarding the Corporate Defendants,
25 relying on its understanding that the FTC had agreed that “its proceedings against the
26 Corporate Defendants would be stayed pending the resolution of the litigation against the
27 Individual Defendants.” (Noland Doc. 406 at 23-24 (citing Noland Doc. 168 at 6, 12-
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13).) (For the reasons explained previously, the FTC respectfully submits that this misinterprets the FTC’s prior position. (Noland Doc. 413 at 5 n.4.)) In particular, the Court held that its Summary Judgment Order was “applicable only to the Individual Defendants” (Noland Doc. 406 at 24) and was “not binding on the Corporate Defendants should they seek to contest at a later date any of the FTC’s allegations against them.” (Noland Doc. 406 at 52).

At this point, proceeding to trial without resolving the status of the litigation as to the Corporate Defendants would be inefficient because it could result in either (1) a more expansive trial than would otherwise be necessary, in which the FTC must prove liability as to the Corporate Defendants; or (2) a second trial for the Corporate Defendants that follows a first trial for the Individual Defendants (and perhaps more trials depending on how the Court handles this issue in light of the Contempt Matter).

The FTC proposes avoiding these inefficient outcomes by allowing the parties and Receiver further time to meet and confer with Individual Defendants’ new counsel regarding the status of the case as to the Corporate Defendants.³ If the parties cannot agree, the FTC will file a motion requesting appropriate relief on or before December 23, 2021.

The Receiver agrees with the FTC that it would be better to allow time for the FTC, the Receiver, and Individual Defendants’ new counsel to try and reach an agreed-upon position regarding the Corporate Defendants. As it currently stands, the Receiver does not believe he has a good faith basis to contest liability. That position was made clear in the Receiver’s initial (February 2020) report. Since writing that report, the

³ On November 1, 2021, the Court, by unnumbered docket entry, granted the *pro hac* admission of counsel for the Individual Defendants, but also on behalf of the Corporate Defendants. The Receiver has informed the FTC that the Receiver did not consent to this representation, and counsel for the Individual Defendants has confirmed the *pro hac* application to represent the Corporate Defendants was inadvertent.

1 Receiver has not been advised by the Individual Defendants, or counsel for the Individual
2 Defendants, of any defenses that the Corporate Defendants might raise that would be
3 materially different than those already being advanced by the Individual Defendants.

4 **C. Scope of Trial (Success By Health Pyramid Scheme)**

5 The FTC respectfully requests further guidance from the Court on whether it will
6 permit the FTC to prove at trial that Defendants' Success By Health ("SBH") program
7 was a pyramid scheme that Defendants promoted by using false income claims.

8 In its Order granting the FTC's Motion for Summary Judgment as to Liability, the
9 Court found that the FTC had satisfied prong one of the pyramid test as to SBH and, on
10 prong two, had presented a "mountain of evidence demonstrating that SBH's structure,
11 incentives, policies, and the repeated statements of the Individual Defendants were all
12 focused on getting Affiliates to recruit new members." (Noland Doc. 406 at 37-38.) The
13 Court nevertheless found a "triable issue of material fact" regarding whether SBH was a
14 pyramid scheme and whether Defendants had misled consumers regarding their potential
15 earnings in SBH. (*Id.* at 38, 40, 46.)

16 In an Order issued the next day, the Court denied the FTC's motion to exclude the
17 Individual Defendants' expert testimony, explaining that because the FTC had proven the
18 Individual Defendants' liability on all counts (as to VOZ Travel), "there will not be a trial
19 on whether SBH also operated as an illegal pyramid scheme." (Noland Doc. 407 at 2.)
20 The FTC sought clarification of the Order, explaining that a trial regarding SBH might be
21 necessary to determine the appropriate injunctive relief to enter against the Individual
22 Defendants. (Noland Doc. 413 at 3-5.) The Court granted that FTC's clarification
23 motion, but did not indicate whether a trial regarding SBH would be necessary. (Noland
24 Doc. 422.)

25 At the Individual Defendants' trial, the FTC intends to prove (1) the amount of
26 monetary judgment "necessary to redress injury to consumers," 15 U.S.C. § 57b(b), from
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1 the Individual Defendants’ rule violations, and (2) that strong injunctive relief is
2 necessary to prevent Individual Defendants from further harming consumers. Regarding
3 injunctive relief, the fact that Defendants ran not one, but two, pyramid schemes further
4 supports the need for fencing-in relief. As to monetary relief, whether SBH was a
5 pyramid scheme is relevant to what, if any, “value” consumers received from the
6 products or services they purchased from Defendants. (Doc. 438 at 14 (faulting FTC for
7 failing to “account for the inherent value of the products and services received by
8 consumers”).)

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10 Dated: November 30, 2021

Respectfully submitted,

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12 /s/ Evan M. Mendelson

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